Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
To: Chief, Common Carrier Bureau	)	

COMMENTS ON PETITION FOR WAIVER

Mobile Telecommunication Technologies Corp. ("Mtel"),[1/] pursuant to the Commission's Public Notice[2/] hereby comments on the Petition for Waiver ("Petition") submitted by AirTouch Paging ("AirTouch") on December 15, 1997. AirTouch requests that, effective as of October 7, 1997, it be granted a limited waiver of its obligation to pay any payphone service provider ("PSP") on a per-call basis unless and until a reasonable period of time after that PSP provides coding digits so that AirTouch is able to

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1/ Mtel has previously participated in this proceeding. It has submitted comments in response to the Commission's Public Notice of August 25, 1997 (DA 97-1673) inviting comment in response to the remand decision by the D.C. Cir., Illinois Public Telecommunications Ass'n v. FCC, 117 F 3rd 555 (1997). It has also filed a Petition for Reconsideration of the Commission's Second Report and Order, FCC 97-371, released October 9, 1997, request for stay and petitions for reconsideration pending; appeals pending *sub nom.* MCI Telecommunications Corp v. FCC (D.C. Cir., Nos. 97-1675, et al.) ("Second Report and Order").

2/ Public Notice, DA 97-2735, released December 31, 1997 (the "Public Notice").

selectively block calls from payphones operated by that PSP. Petition, at 6. For the reasons set forth below, Mtel supports the AirTouch Petition, requests that the same treatment be afforded to Mtel and all similarly situated entities[3/], and submits that only by granting the Petition can the Commission act consistently with the Congressional mandate to "promote competition among payphone service providers and to promote the widespread deployment of payphone services to the general public".[4/]

I. Background

The Telecom Act was passed less than two years ago. Yet, there have already been several Commission decisions[5/] and one partial remand decision from the D.C. Circuit, all in this proceeding.[6/] The Commission's treatment of call-blocking rights has been critical to many of these decisions. When the D.C. Circuit upheld the Commission's "carrier pays" solution for PSP compensation regarding 1-800 calls, it did so only based upon the understanding that those parties who ultimately must pay for the

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3/ To this extent, these comments should be construed to request an independent request for waiver by Mtel.

4/ Telecommunications Act of 1996, Pub. L. No. 104-104 Stat. 56 (1996), 47 U.S.C. § 276(b)(1) (the "Telecom Act").

5/ Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20, 541 (1996), Order on Reconsideration, 11 FCC Rcd 21, 233 (1996) ("Reconsideration Order"), Second Report and Order.

6/ Illinois Public Telecommunications Ass'n v. FCC, 117 F.3rd 555 (1997).

calls would have an ability to decline (i.e., block) the calls.[7/] The Court specifically referenced and relied upon Commission pronouncements that the party who would have to pay for the call could avoid it, and would have some leverage "to negotiate for lower per-call compensation amounts".[8/]

Relying on what the Commission had said, the Court reasoned as follows:

> [s]ubscribers to an 800 service can utilize a carrier's call-blocking capability by negotiating with the carrier to block calls from payphones with excessive per-call compensation charges. *Order* ¶ 17. Further, as discussed above, we have determined that the Commission reasonably concluded that carriers can and will develop blocking technology. Thus, a "buyer" (the carrier or the 800 service subscriber) will have the option of rejecting a "seller's" (the PSP) excessively priced service.

Illinois Public Telecommunications Ass'n., at 566-67. Based upon the above, the Commission's "carrier pays" system was held not to be arbitrary and capricious. Id, at 567.

[7/] In so doing, the Court was responding to the eminently logical argument that the Commission's goal to create "a competitive payphone industry" cannot be squared with its election to utilize a "carrier pays" system because such a system "does not -- indeed cannot promote competition . . . because the party causing the cost (the caller) does not have to pay for it, and the party incurring the cost (the carrier or, if the cost is passed on, the 800 service subscriber) has no way to decline it". Illinois Public Telecommunications Ass'n v. FCC, at 566.

[8/] Id., citing to and quoting from the Commission's Order on Reconsideration in CC Docket No. 96-128, 11 FCC Rcd 21233 (1996) ("Order on Reconsideration").

When the Commission issued its Second Report and Order, the Commission maintained its reliance upon the leverage that was established by virtue of its call blocking option. Specifically, the Commission explained that:

> [w]e also reject that use of a market-based compensation standard, in lieu of one that is cost-based, will overcompensate PSPs. The marketplace will ensure, over time, that PSPs are not overcompensated. Carriers have significant leverage within the marketplace to negotiate for lower per-call compensation amounts, regardless of the local coin rate at particular payphones, and to block subscriber 800 calls from payphones when the associated compensation amounts are not agreeable to the carrier.

Second Report and Order, at ¶ 97.

II. The AirTouch Petition

As AirTouch explained in its Petition, in the payphone proceeding the Commission was clear in that "to be eligible for [such] compensation, payphones will be required to transmit specific payphone coding digits as part of their ANI". Reconsideration Order, at [¶ 64]. Notwithstanding this, on the very day that the Commission's payphone compensation scheme became effective, the Commission's Common Carrier Bureau (the "Bureau") waived for a five-month period the requirement that local exchange carriers provide the type of data expressly required by the Commission.[9/] Based upon this clear, unexplained and seemingly irrational difference in treatment, AirTouch requested a waiver of

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[9/] Order, DA 97-2162 (Com. Car. Bur., rel. Oct. 7, 1997) (the "Waiver Order").

the Commission's rules in order to bring its obligations to reimburse PSPs into line with its ability to pass through changes to the ultimate customers, as envisioned by the rules.

III. The Waiver Standard

Pursuant to §1.3 of the Commission's rules, the Commission may waive any rule "for good cause shown". 47 C.F.R. §1.3. Waiver is appropriate whenever "special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest".[10/] In assessing whether the public interest would be furthered by grant of waiver the Commission generally assesses whether (a) the underlying purpose of the rule would not be served or would be frustrated in the absence of a waiver grant or; (b) unique circumstances exist that would make it inequitable or unduly burdensome in the absence of a waiver.[11/] Here, waiver is necessary both to avoid frustration of the underlying intent behind the rules and in view of the unusual and unexpected developments associated with the Waiver Order.

IV. Grant of Waiver is Necessary to Avoid Frustration of the Underlying Intent of the Commission's Rules

As set forth above, the Commission expressly recognized the right of carriers to block calls as being a *quid pro quo* for the Commission having the right to impose default per-call compensation charges. See, §I, supra. The Court also recognized that the

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[10/] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[11/] See, 47 C.F.R. §22.119; 47 C.F.R. §90.151.

ability of carriers to block calls was a critical component in the Commission's analysis and in the Court's willingness to affirm the Commission's decision. See, §I, supra. Indeed, from the inception of rules requiring that carriers provide compensation for use of payphones in the placement of 1-800 calls, the Commission recognized the right of those carriers to pass the cost of the calls onto ultimate called parties.

In view of the above, there can be no question but that the clear intent of the Commission's rules was to require carriers to pay for the use of payphones associated with 1-800 calls only when those carriers could be reimbursed for such usage. The Waiver Order undermines the carriers' ability to be reimbursed for certain of those calls. Under such circumstances, grant of waiver as requested by AirTouch is both necessary in order to permit the Commission's goals to be achieved, and will not in any way frustrate the underlying purpose of the Commission's rules.

V. Unique Circumstances Exist That Warrant a Waiver

The Bureau has already held that the facts and circumstances surrounding blocking are sufficiently "unique" to warrant grant of waiver. Waiver Order. Having already granted one waiver, based upon the presence of such unique circumstances, it would be most arbitrary and capricious for the Bureau to now view those same circumstances differently.

No party has argued that the inability of the industry to provide blocking capability is not unique, or is not a crucial

component of the Commission's rules. Rather, opponents have been limited to arguing that some blocking capabilities exist[12/] and that "over time IXCs' ability to block calls will give them and their customers significant leverage to negotiate lower rates".[13/] Neither of these arguments undermine the fact that there exists unique and unusual circumstances that mandate grant of the AirTouch waiver.

VI. Conclusion

When the Commission promulgated per-call compensation rates, it strived to meet its mandate to provide for "fair" compensation for use of payphones to place 1-800 calls. The Commission equated market-based rates with fair compensation. It expressly provided that rates available would be market-based because carriers had the option of blocking calls in the absence of their being provided with market-based rates. It is now undisputed that blocking options are available only in certain instances. This clearly undermines totally any propriety associated with a carrier's pay

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12/ See, e.g., the RBOC/GTE/SNET Coalition (the "Coalition") Opposition to PCIA's Request for Stay, submitted December 9, 1997, at 5-6; Coalition Opposition to Petitions for Reconsideration, submitted January 7, 1998, at 4 ("Coalition Opposition"). At both places, the Coalition attempts to distort a news article reporting upon limited blocking by Mtel. (See, Mike Mills, "That New Number: 1-800 Blocked", Washington Post, at B-11, Dec. 3, 1997). The fact that some calls are being blocked in no way contradicts the admission of certain LECs and the Bureau that many -- estimated by the Bureau to be approximately forty percent -- of payphone calls cannot now be blocked.

13/ Coalition Opposition, at 5. (Emphasis in original).

compensation obligation for those payphones where blocking is not available.

The instant waiver requests only that carriers' obligation to pay "fair" compensation to PSPs be deferred temporarily until carriers are afforded the corresponding opportunity to block calls. Few things could be more simple, or more consistent with the intent and the design of the Commission's rules, and with fundamental equity.

Wherefore, Mtel urges the Commission to grant AirTouch and to all similarly situated entities, including Mtel, the relief sought in AirTouch's Petition.

Respectfully submitted,

MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.

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January 15, 1998

CERTIFICATE OF SERVICE

I, Jennifer McCord, a secretary in the law firm of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 16th day of January, 1998, sent by first class U.S. mail copies of the foregoing "COMMENTS ON PETITION FOR WAIVER" to the following:

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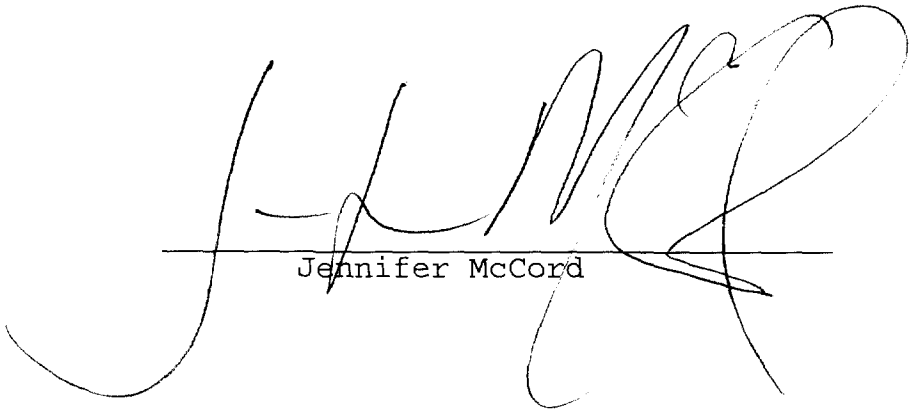

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